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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 924

DOROTHY RORRISON RINGELE, *Petitioner,*

v.

J. W. TERTELING and N. L. TERTELING, Co-partners doing business under the firm name and style of J. A. Terteling and Sons, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The petitioner, Dorothy Rorrison Ringele, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Idaho entered in the above-entitled cause on December 20, 1956.

OPINIONS BELOW

The original opinion of the Supreme Court of the State of Idaho was filed on February 28, 1956, and the opinion on rehearing was filed on December 20,

1956. Both of these opinions are reported at 78 Idaho ——; 305 P. 2d 314. Copies of these opinions are printed as Appendix A, *infra*, pp. 1a-8a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This action began as a private suit between the petitioner and the respondents for the value of gravel taken from petitioner by respondents in their completion of a Government contract entered into pursuant to the First War Powers Act. Petitioner lost in the trial court but the decision of the trial court was reversed on appeal to the Supreme Court of Idaho by an opinion handed down on February 28, 1956. While a rehearing was pending before the Supreme Court of Idaho on petitions by both parties, the United States filed a brief *amicus curiae* advising that Court of its interest in an affirmance of the trial court.

On December 20, 1956, the Supreme Court of Idaho entered an opinion in which it granted the rehearing and affirmed the trial court.

The time within which to file this petition for a writ of certiorari was enlarged by an order entered by Mr. Justice Douglas pursuant to 28 U.S.C. 2101(c). The petition is due to be filed on or before April 19, 1957.

The jurisdiction of this Court is invoked under Section 1 of the Fourteenth Amendment of the Constitution of the United States and under the provisions of 28 U.S.C., Sections 1257(3) and 2101(c).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is Section 1 of the Fourteenth Amendment which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [28 U.S.C.A. Const. Amend. 14]

The statutes involved are the First War Powers Act of December 18, 1941, c. 593, 55 Stat. 838, 50 U.S.C. App. Sections 601 and 611, and the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 176, 50 U.S.C. App. Sec. 632. The pertinent provisions of these statutes are set out in Appendix B, *infra,* pp. 9a-10a.

QUESTIONS PRESENTED

1. Do the First War Powers Act and the Second War Powers Act permit Government contractors to take private property in fulfilling their contract without becoming subject to a common law action in the State courts?

2. When a State Supreme Court in an action against a Government contractor deprives a citzen of the recovery provided for in the common law action of indebitatus assumpsit, has it failed to afford the citizen the due process of law guaranteed by Section 1 of the Fourteenth Amendment?

STATEMENT OF THE CASE

On December 29, 1942, the United States Government pursuant to the First War Powers Act entered into a negotiated contract with the respondents to assist in the construction of an air-base in Elmore County, Idaho. Shortly thereafter, the respondents went upon the real estate of petitioner and dug and converted 110,000 cubic yards of gravel therefrom which were used in the construction of the air-base. Respondents were subsequently paid in full by the United States Government. (R. 47-48; App. C, p. 19a)[1].

Petitioner at all times concerned was the owner of the real estate involved and her deed and those of her predecessors in title were duly of record in Elmore County (R. 39, 45-46; App. C, p. 17a). Neither the respondents nor the United States Government made any contract or arrangement of any kind with the petitioner for the taking of this gravel, and all of it was taken without her consent or knowledge (R. 49-50; App. C, p. 21a).

Petitioner brought her action in the District Court of Idaho. In her petition she waived the tort, proceeded in assumpsit upon the implied contract, and prayed for the amount which the Government had paid to the respondents for said gravel (R. 22-23). Respondents pleaded in complete bar and did not plead any claim for any reduction for enhancement (R. 25-31; App. C, pp. 11a-16a). A written stipulation of counsel covered all of the material facts (R. 39-44). The District Court held for respondents. In doing so it made

[1] The answer filed by respondents raising the federal question and the findings of fact and conclusions of law of the trial court have been printed as Appendix C, *infra*, pp. 10a-24a.

the following finding of fact that (R. 49; App. C, p. 20a):

> * * * all gravel, aggregate, and materials extracted by them from the lands owned by the plaintiff [petitioner herein] were extracted and taken for the use and benefit of the United States of America in building and constructing said airport project and for no other purpose and * * * the defendants were acting pursuant to and in accordance with the terms of its written contract with the War Department of the Government of the United States.

The trial court then concluded as a matter of law (R. 52; App. C, p. 23a):

> That the plaintiff cannot maintain this action in indebitatus assumpsit, or otherwise, against the defendants.

The petitioner thereafter perfected an appeal to the Supreme Court of Idaho. On February 28, 1956, the Supreme Court reversed the District Court and held that the petitioner had "been permanently deprived of her property without compensation and due process of law," but that petitioner had misconceived her remedy (R. 64-70; App. A, p. 7a). The case was accordingly remanded to the trial court with directions.

Both parties filed petitions for rehearing with the Supreme Court of Idaho. On June 21, 1956, the United States was permitted to file a brief *amicus curiae* in which it represented its interests to be as follows:

> The United States has a financial interest in the outcome of this action, since it takes the position, despite the argument being made and the previous opinion of this Court, that the contract

> between the Government and the respondents was legal and within the authority of the agents who so contracted. The contract, like many other similar agreements executed by the United States, is valid, and hence the Government would seem to be ultimately liable for any judgment recovered by appellant. [Qualifying footnote omitted.]
>
> Far more important to the United States, is the ruling upon the questions of law presented and the authority to make such contracts. The theory advanced in the previous opinion in this case would, if correct, seriously impinge upon the abilities of the United States through contractors to make appropriate provisions and to expedite the construction of federal projects. For these reasons, it is especially important that the law applicable to such matters be correctly stated and, accordingly, this brief is submitted.

The United States also presented oral argument at the rehearing (R. 71; App. A, p. 8a).

An opinion on rehearing was given on December 20, 1956, in which the Court held that the persistance of the petitioner in her original theory "vitiates" the purpose for which the cause was originally remanded. The judgment of the trial court was then affirmed. (R. 71; App. A, p. 8a).

The federal question was raised in the second amended answer to the second amended complaint (R. 25-27; App. C, p. 12a); and noted by the trial court in paragraphs V through X of its findings of fact (R. 47-48; App. C, pp. 19a-21a) and in paragraphs I and II of its conclusions of law (R. 51-52; App. C, p. 23a). The problem was considered by the Supreme Court of Idaho in its original opinion which reversed the trial court (R. 64-65; App. A, p. 2a).

REASONS FOR GRANTING THE WRIT

The Supreme Court of Idaho originally held that petitioner was entitled to recover and then reversed itself following an *amicus curiae* argument made by the United States based on the First and Second War Powers Acts. The effect of this action is to hold that a Government contractor may take private property at will without any requirement to respond to the owners in the local courts. Such a construction of the two Federal statutes involved is not in accord with Section 1 of the Fourteenth Amendment and is not in accord with the applicable decisions of this Court. *Stone* v. *United States,* 167 U. S. 178.

Such a far reaching construction of the First and Second War Powers Acts is definitely a federal question of substance which should be determined by this Court.

The reason given by the Supreme Court of Idaho for its decision on rehearing was that the filing of a petition for rehearing by petitioner had "vitiated" the original decision (R. 71; App. A, p. 8a). If a partially successful litigant loses a partial recovery simply by asking for reconsideration of the balance of the claim, such a procedure is such a departure from accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

The First and Second War Powers Acts were designed to grant authority to the Government Departments so as to speed the war effort and avoid some of the cumbersome delays normally an incident to

Government contracting. (See H. Rept. No. 1507, 77th Cong., 1st Sess., 1941 U. S. CODE CONG. SERV. 1941, p. 1029.)

The Court below has in effect treated this legislation as though it authorized Government contractors to take private property at will. If the statute can be so construed, then obviously that interpretation would make it contrary to the 14th Amendment and therefore unconstitutional.

The record is clear that the property involved was taken by respondents without any notice to the petitioner. Certainly, the mere execution of a Government contract can hardly justify such action.

One last point should be noted. The opinion on rehearing gives as the sole ground for changing the Court's position, the fact that petitioner had sought a rehearing on that portion of the original opinion which had been against her. If a litigant must risk a partial recovery in order to ask for a rehearing on the balance, then it is submitted that there is a far departure from normal judicial procedures. While this ground is generally referred to in connection with proceedings in the United States Courts of Appeal, it is believed the ground may also be invoked in a situation as far reaching as the one at bar.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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April, 1957

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 8259

Boise, January Term, 1956

DOROTHY RORRISON RINGELE, *Plaintiff-appellant,*

v.

J. W. TERTELING and N. L. TERTELING, co-partners doing business under the firm name and style of J. A. TERTELING AND SONS, *Defendants-respondents.*

Filed February 28, 1956

Clay Koelsch, Clerk

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for Ada County. Honorable Charles E. Winstead, District Judge.

Action to recover for gravel wrongfully removed from premises of plaintiff. Judgment for defendants. *Reversed* and remanded.

E. G. Elliott, James H. Hawley, Boise, for appellant.
Donart & Donart, Weiser, for respondents.

PORTER, J.

By her second amended complaint, appellant alleges substantially as follows: That at all times mentioned therein up to May 6, 1943, appellant was the owner of and in possession of Lot 13 of Jerome's Addition to Mountain Home, Idaho. That between the dates of November 1, 1942, and May 6, 1943, respondents willfully trespassed upon said land and took and removed therefrom 110,000 cubic yards of appellant's rock, gravel and sand which were then in place upon said premises. That said rock, gravel and sand were severed from said land without appellant's consent and sold by respondents to the War Department of the United States Government for the sum

of $227,700 which said sum was paid to respondents by said War Department as and for the purchase price of said property; and that respondents thereby became indebted to appellant in said sum. That appellant brings action in assumpsit upon said contractual indebtedness and hereby waives all right of action for any tort above set forth. Appellant prays judgment for $227,700 with interest thereon.

By way of second amended answer to appellant's second amended complaint, respondents deny generally the allegations of said second amended complaint. For a first separate defense and answer, respondents allege that in harmony with the "First War Powers Act of 1941" and Executive Order No. 9001 authorizing and directing the building of airports by the War Department, respondents entered into a written contract with the War Department by the terms of which, among other things, respondents agreed to build and construct an airport at a point approximately 14 miles south of Mountain Home, Idaho. That the removal of said rock, gravel and sand was in pursuance of and under the terms of said contract and that at all times the respondents were acting as the agents, servants and employees of the Government of the United States. And that all materials extracted by respondents from said land were taken for the use and benefit of the Government of the United States in building and constructing said airport.

For a second affirmative defense, respondents allege that the Government of the United States of America filed an action to condemn said land on May 6, 1943, and subsequently acquired title thereto in such condemnation proceedings wherein the compensation therefor was fixed at $125.

Appellant demurred to respondents' first and second affirmative defenses but such demurrer was overruled. At the trial of the cause most of the facts were stipulated

including the execution of the contract between the War Department and respondents, in evidence as Plaintiff's Exhibit 1. The trial court entered findings of fact and conclusions of law favorable to respondents and entered judgment thereon for respondents. From such judgment appellant prosecutes this appeal.

By her assignments of error, appellant particularly challenges the affirmative defenses of respondents. Irrespective of the merits of such affirmative defenses, the fundamental weakness of appellant's case lies in the failure of the proof to sustain the theory upon which appellant seeks to recover.

The contract between the War Department and respondents is voluminous, but in respect to the rock, gravel and sand in issue, it contains, under Specification No. 698-398 special conditions at SC-7, the following material provisions:

> "Work to be done.—The work to be done under these specifications consists of furnishing all the necessary equipment, labor and materials, except such materials as herein specified to be furnished by the Government, * * *."
>
> "Government furnished materials and/or equipment.—The materials and equipment entering into the construction under this contract which are not to be procured by the contractor are as follows for each part of this contract.
>
> * * *
>
> "(2) Gravel pit site.—The Government will furnish without cost to the contractor, a gravel pit site, which will be designated by the contracting officer, in the S.W. ¼, Sec. 23, T. 3 S., R. 6 E. B.M., as provided for in the technical provisions of these specifications."

The contract further contains under "Section II, Production and Stockpiling of Aggregate", the following provisions:

"2-01. Scope.—The work to be done under this section includes the furnishing of all materials and equipment and performing all labor necessary to furnish, deliver and stockpile the concrete aggregate, for cantonment structures, and screenings in accordance with these specifications and as otherwise directed.

"2-02. General.—The Government will furnish without cost to the contractor, gravel pit sites in the following locations:

"All of lots * * * 13 * * * lying south and west of Oregon Short line railroad right-of-way, the above in section 23, Township 3 south, range 6 east, Boise, Meridian."

"2-11. Measurement and payment.—The quantity of the various aggregates to be paid for will be the number of cubic yards of aggregates produced and stockpiled in accordance with the specifications. The quantity to be paid for will be the number of cubic yards determined by measurement in railroad cars at the point of loading."

Lot 13 contains approximately 4 acres, and is a part of the approximately 138 acres designated as a gravel pit under the terms of the contract, Exhibit 1. On or about the first of November, 1942, the Corps of Army Engineers, without the knowledge or consent of the appellant, went upon and explored such Lot 13 and found gravel therein suitable for construction purposes at the Mountain Home Airbase. They then and there staked out said ground for such purposes and designated Lot 13 as one of the lots from which gravel should be taken for such construction purposes.

On or about December 29, 1942, respondents, pursuant to the terms of the contract, Exhibit 1, entered upon such Lot 13 and severed, removed, processed and transported from such Lot 13, 110,000 cubic yards of gravel and delivered the same to the United States Government at the Mountain Home Airbase, approximately 14 miles away as provided in said contract. Neither the Government of

the United States nor respondents procured any title to Lot 13 or the gravel thereon prior to the removal of such gravel. The evidence of appellant shows that respondents were paid by the Government of the United States in connection with the gravel removed from Lot 13 in an amount in excess of the $227,700 prayed for in the second amended complaint.

By her second amended complaint, appellant waived the tort and elected to sue in assumpsit for money had and received by respondents for the use and benefit of appellant in the sum of $227,700 allegedly paid by the Government to respondents as the purchase price of the gravel. The evidence supports Finding of Fact No. 12 of the trial court reading as follows:

> "That no part of said gravel so removed from said Lot Thirteen was sold by the defendants to the Government of the United States; that the compensation received by the defendants from the Government of the United States under the terms of the contract hereinbefore mentioned was paid to the defendants for servicing, processing and extracting said gravel from said gravel pit and placing the same in position as a part of the construction of said air base;"

It thus appears that there was no sale of any gravel by respondents to the Federal Government and that no money was had and received by respondents for the benefit of appellant by virtue of any such alleged sale. Irrespective of the legal issue as to the right of appellant to recover for money had and received in the event of a sale, the facts herein preclude a recovery by appellant upon her theory and under her evidence.

Unless one of the affirmative defenses is good, appellant would be entitled to recover in this case and her measure of damages would be either the value of the gravel in place or the value of the gravel in the hands of respondents dependent upon the circumstances connected with the original trespass. However, appellant neither pleaded nor

proved or offered to prove the value of the gravel in place or in the hands of respondents after its removal. Therefore, the trial court was not in a position upon the evidence before it to enter any judgment for appellant. Martin v. Grogan-Cochran Lumber Co., (Tex.) 176 S.W. 2d 780.

The evidence in this case is undisputed that respondents entered upon the premises of appellant in good faith in pursuance of the terms of the contract, Exhibit 1, and under the mistaken belief that the Government of the United States owned the land or gravel in question. The entry was openly made and was not arbitrary or malicious. Under such circumstances, and appellant having waived the tort and sued in assumpsit, the measure of appellant's right of recovery would be the reasonable market value of the gravel in place on the premises. See Bolles Wooden Ware Co. v. United States, 106 U.S. 432, 27 L. Ed. 230; Wolfe v. Shell Petroleum Corp., 83 F. 2d 438; The J. Oswald Boyd, 53 F. Supp. 103; Martin v. Grogan-Cochran Lumber Co., supra; Watkins v. Siler Logging Co., (Wash.) 116 P. 2d 315; 89 C.J.S., Trover and Conversion, par. 169, p. 647.

Respondents contend under their first affirmative defense that by virtue of the contract, Exhibit 1, they were officers, servants and agents of the Federal Government and as such are relieved from liability and that any recourse of appellant is against the Federal Government. As authority for this position, they cite the following cases; Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 84 L. Ed. 554; Garrett v. Jones (Okl.) 200 P. 2d 402; and Moore v. Clark, 235 N.C. 364, 70 S.E. 2d 182. These cases lend support to the proposition that an agent or officer of the United States or Government contractor purporting to act on its behalf is liable for his conduct causing injury to another only if he exceeds his authority or if such authority was not validly conferred on him; the remedy in such a case being by suit against the Federal Government in the court of claims.

However, the cases cited by respondents do not appear to be controlling herein. This suit does not involve the *taking* of property for the construction of an airport thereon where the only issue would be the amount of compensation as in a proper condemnation proceeding; or does not involve damages arising incidental to the construction of an airport. This action is primarily to recover damages for the tortious severance and appropriation of appellant's gravel prior to the purchase, seizure or condemnation of appellant's land. Such conversion appears to be the commission of an act beyond the authority conferred upon the Engineers of the War Department and beyond their authority to authorize respondents to commit.

It appears that respondents no longer urge that the judgment in the condemnation proceedings by the Federal Government against such Lot 13 is res adjudicata in this action.

The gravel belonging to appellant was removed from her premises without her knowledge and consent and delivered to the Federal Government by respondents. She has been permanently deprived of her property without compensation and due process of law. Due to her mistaken theory as to the measure of her damages, the trial court could not render judgment in her favor under the evidence before it. Under all the facts and circumstances in this case including the taking of the gravel under war conditions, we have concluded that the record will support the remanding of this case to the trial court with directions to permit the parties to interplead on the issue of the amount of damages and to offer proof on such issue; and for the trial court to make a finding thereon and to enter judgment for appellant for the amount thereof.

The judgment of the trial court is reversed and the cause remanded for further proceedings in accordance with this opinion. Costs to appellant.

TAYLOR, C. J., KEETON, ANDERSON and SMITH, J. J., concur.

RINGELE v. TERTELING

No. 8259

(December 20, 1956)

On Rehearing

Sherman F. Furey, Jr., United States District Attorney, Boise, and Roger P. Marquis, Washington, D. C., for Amicus Curiae, at the rehearing.

PORTER, J.

Appellant and respondents each filed a petition for rehearing in this cause. Such rehearing was granted and has now been held. The United States was permitted to appear as Amicus Curiae and to file a brief and present oral argument at the rehearing.

We have again examined and considered the questions of law and fact involved in this case. Likewise, we have again considered the propriety of remanding the cause for further pleading and proof on the measure and amount of damages. Appellant, in her petition for rehearing and in her oral presentation at such rehearing, rejected the measure of damages as determined by the Court and persisted in her theory as to the measure of damages. This position of appellant in effect vitiates the purpose for which the cause was ordered remanded and fairly brings appellant under the well recognized rule that generally, an appellant will be held to the theory on which the case is tried in the court below.

We adhere to and adopt the opinion originally filed herein as the opinion of the Court upon the rehearing, save and except that the cause will not be remanded for further pleading and proof. The judgment of the trial court is affirmed. Costs awarded to respondents.

TAYLOR, C. J., KEETON and SMITH, J. J., concur.

ANDERSON, J., sat at the rehearing, but died before final decision of the cause.

APPENDIX B

The First War Powers Act of December 18, 1941, c. 593, 55 Stat. 838, 839, provides in part:

> (a) *Sec. 1, Title I, 50 U.S.C. App. sec. 601:* For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such maner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, * * *.
>
> (b) *Sec. 201, Title II, 50 U.S.C. App. sec. 611:* The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: * * *.

Title II of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 176, 50 U.S.C.A. App. sec. 632, provides in part:

> The Act of July 2, 1917 (40 Stat. 241) [Title 50, § 171], entitled "An Act to authorize condemnation proceedings of lands for military purposes," as

amended, is hereby amended by adding at the end thereof the following section:

"Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357) [Title 40 §§ 257, 258], or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712) section [1171 (b) of this Appendix]. Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act [this section and section 171 of title 50], notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended [Title 33, § 733; Title 34, § 520; Title 40, § 255; Title 50, § 175]."

APPENDIX C

Title of the Court and Cause

Second Amended Answer to Second Amended Complaint

Come now the defendants and answering the second amended complaint of the plaintiff on file herein, admit, deny and allege as follows:

I

These answering defendants deny each and every allegation, statement and fact contained in the second amended complaint of the plaintiff, except as the same is hereinafter specifically admitted, either in the answer to the second amended complaint or in the further answer and separate defense.

II

These answering defendants admit that they are and at all times mentioned in plaintiff's second amended complaint were a co-partnership doing business under the firm name and style of J. A. Terteling and Sons, of Boise, Idaho.

III

These answering defendants admit they have not paid to the plaintiff, nor caused to be paid to her any sum whatsoever, and admit they have at all times and do still refuse to pay any sum whatsoever to the plaintiff.

These answering defendants further admit that on and from February 26th, 1943, the plaintiff herein was the record title owner of Lot Thirteen (13) of Jerome Addition to Mountain Home, Idaho.

For a first and further separate defense and answer to plaintiff's second amended complaint, these defendants allege:

I

That on the 8th day of December, 1941, pursuant to the recommendation and request of the President of the United States of America to the Congress thereof, a state of war was declared to exist between the Government of the United States of America on the one hand, and the Imperial Government of Japan, the Government of Germany and the Government of Italy on the other. That thereafter and on December 18, 1941, the Congress of the United States

of America passed and immediately thereafter the President approved the "First War Powers Act of 1941", being Title 50, App. 601, U.S.C.A., and thereafter and pursuant to said act, and in harmony with and by virtue thereof, the President of the United States of America on December 27th, 1941, made, issued and published and caused to become effective Executive Order No. 9001, authorizing and directing, among other things, the War Department of the United States to construct and build airports and enter into contracts for the building and construction of the same for the United States of America, and to do any and all acts or things incidental thereto or in connection therewith, all in the furtherance of the effort of the United States of America to bring the war to a successful conclusion.

That in harmony with said First War Powers Act of 1941, and Executive Order No. 9001 above referred to, the United States of America acting through its War Department, Corps of Army Engineers, did on December 29th, 1942, enter into a written contract with these defendants by the terms of which, among other things, these defendants agreed to build and construct an airport at a point approximately fourteen miles south of Mountain Home, Idaho, and among other things, the said contract provided that the Government of the United States of America would provide and designate gravel pits where the gravel aggregate and materials for said airport could be taken by these defendants and in harmony with said contract, the United States of America, by and through its War Department Corps of Army Engineers designated the place where said materials were to be taken, staked out the same and directed these defendants to take and extract the gravel aggregate and materials from the pit so designated, a part of which pit was on the lands claimed to be owned by the plaintiff herein.

II

That either on December 29th, 1942, or immediately thereafter and pursuant to the contract hereinabove referred to and at the direction of the Corps of Army Engineers of the War Department, as hereinbefore referred to, these defendants entered upon the land of the plaintiff for the purpose of carrying out the terms and provisions of the contract hereinbefore referred to and for the building and constructing of said airport, and these defendants affirmatively allege that at no time prior to December 29th, 1942, were they upon the land of the plaintiff for any purpose whatsoever. That said contract above referred to is before this court pursuant to stipulation between the parties entered in open court, and said contract is hereby adopted and made a part of this answer as fully and completely as if the same were set out herein in full.

III

That at all times these defendants were acting as the agents, servants and employees of the Government of the United States, and all gravel aggregate and materials extracted by them from the land alleged to be owned by the plaintiff were extracted and taken for the use and benefit of the Government of the United States of America, in the building and constructing of said airport project and for no other purpose.

IV

That these defendants are informed and believe and upon information and belief allege that on or about November 1st, 1942, the Government of the United States of America, acting by and through its War Department, Corps of Army Engineers, went upon the land alleged to be owned by the plaintiff, together with adjacent lands thereto, for the purpose of exploring the same in its attempt to find and locate suitable materials for the con-

struction of the airport hereinabove referred to and did explore the same and on or about said date, did actually take possession thereof and kept and retained possession of the lands alleged to be owned by the plaintiff, together with the lands adjacent thereto, until all materials necessary for the building and constructing of said airport had been extracted therefrom. That at the time the defendants herein entered upon said lands, namely, either on or immediately after December 29, 1942, the Government of the United States of America was in possession of the land alleged to be owned by the plaintiff herein.

V

That Lot Thirteen (13) of Jerome Addition to Mountain Home, Elmore County, Idaho, is part of a tract of land in said addition which consists of 138.5 acres, being that part of said addition in the Southwest Quarter (SW¼) of Section Twenty-three (23), Township Three (3) South, Range Six (6) East of the Boise Meridian, in Elmore County, Idaho, lying south and west of the main line of the Union Pacific Railway; that said Lot Thirteen claimed to be owned by the plaintiff, has the dimensions of 291.12 feet north and south and 600.4 feet east and west, having an area of 4.001 acres.

For a further answer to plaintiff's second amended complaint and as a second affirmative defense thereto, these defendants allege:

I

That subsequent to the actual taking of said property by the United States of America as alleged in defendants' first further defense, the Government of the United States of America appraised the value of said property so taken and the value of said Lot Thirteen was fixed at $125.00 by said appraisement; that on May 6th, 1943, the United States of America filed an action in the District Court of

the United States in and for the District of Idaho, Southern Division, Case No. 2225, wherein the United States of America was petitioner, and 138.5 acres of land more or less, in Elmore County, Idaho, and the purported owners thereof, were defendants, said suit being for the purpose of condemning, acquiring title to, and ascertaining the value of 138.5 acres of land lying in the southwest quarter (SW¼) of Section Twenty-three (23), Township Three (3) South, Range Six (6) East of Boise Meridian, in Elmore County, Idaho, lying south and west of the main line of the Union Pacific Railway which property included said Lot Thirteen of Jerome Addition to Mountain Home, Idaho, said 138.5 acres of land being the property of which the United States of America had taken the actual and physical possession on or about the 1st day of November, 1942.

That at the time said petition for condemnation was filed, the United States of America also filed a motion for an order granting immediate possession of said 138.5 acres and thereupon on said 6th day of May, 1943, the Judge of said court made and entered an order granting immediate possession of said property to take effect at 12:00 o'clock noon, May 7th, 1943.

That on November 3, 1943, the United States of America filed a declaration of taking Tract No. 4, being Lot Thirteen of Jerome Addition to Mountain Home, Elmore County, Idaho, together with other property, and designated the purported owner of said Lot Thirteen as Dorothy Rorrison Ringele, and the estimated compensation therefor being $125.00, which amount, together with other amounts, was deposited with the Clerk of the United States District Court at Boise, Idaho, as the appraised and estimated value of said Lot Thirteen; that on November 4, 1953, the Judge of said court made and entered an order on said declaration of taking, by which title to said property of the above named plaintiff was vested in the United States of America.

That thereafter and on the 11th day of January, 1944, the United States of America filed an amended petition for condemnation of said property hereinbefore described, including said Lot Thirteen; That on January 19, 1945, the plaintiff herein filed an answer to said amended petition; that on the 22nd day of February, 1945, said cause came on for trial before the court a jury having specifically waived; that thereafter and on the 26th day of February, 1945, the Judge of the United States District Court made and entered a preliminary order of condemnation in which the court decreed in part as follows:

> "That, as of May 7th, 1943, the fair market value of parcel No. 4, is the sum of $125.00, and that Dorothy Rorrison Ringele is entitled to have the same in full settlement for said Parcel No. 4."

That on said 26th day of February, 1945, said Ed L. Bryan, Clerk of said court, mailed a check of the United States of America, No. 818, to said Dorothy Rorrison Ringele in the sum of $125.00 in conformity with said preliminary order of condemnation of said court, which sum was received by said Dorothy Rorrison Ringele and upon payment of said check, the same was returned to said Ed L. Bryan, Clerk of said court.

That thereafter and on the 5th day of March, 1945, the above entitled court made and entered a final decree of condemnation of said 138.5 acres of land in Elmore County, Idaho.

WHEREFORE, said defendants herein having fully answered the second amended complaint of the plaintiff, pray that she take nothing and that her said second amended complaint be dismissed and that defendants have judgment for their costs incurred herein.

FRED M. TAYLOR
J. F. MARTIN
Attorneys for defendants
Residence: Boise, Idaho

• • • • • • • • • • •

Title of the Court and Cause

Findings of Fact and Conclusions of Law

The above entitled cause came on regularly for trial upon the Second Amended Complaint of the Plaintiff and the Second Amended Answer to Second Amended Complaint filed by the defendants, in open court at Boise, Idaho, before the Court sitting without a jury, E. G. Elliott and James H. Hawley both of Boise, Idaho, appearing as attorneys for the Plaintiff, and Fred M. Taylor of Boise, Idaho, and George Donart of Weiser, Idaho, appearing as attorneys for the defendants, whereupon the following proceedings were had:

A written Stipulation of Facts signed by counsel for both parties was filed by the Court and additional testimony was introduced and each of the parties having rested his respective case, the cause was submitted to the Court for consideration and decision.

The Court being fully advised as to the law and the premises hereby makes and enters its Findings of Fact and Conclusions of Law as follows:

The Court hereby FINDS:

I.

That the defendants, J. W. Terteling and N. L. Terteling, at all of the times hereinafter mentioned were co-partners, doing business at Boise, Idaho, under the firm name and style of J. A. Terteling and Sons;

II.

That at all times herein mentioned and up to and including the 6th day of May, 1943, plaintiff was the owner of, in possession of and entitled to possession of the following described real property, to-wit:

Lot 13 of Jerome's Addition to Mountain Home, Idaho.

III.

That neither on the 6th day of May, 1943, nor at any other time were the defendants, or either of them, indebted to the plaintiff in the sum of Two Hundred Twenty-seven Thousand Seven Hundred and no/100 ($227,700.00) Dollars, or any part thereof for money on or about that time had and received by defendants for the use of the plaintiff or for any other reason. That the defendants did not between the dates of November 1, 1942, and May 6, 1943, or at any other time wilfully or otherwise, trespass upon the land hereinbefore described and did not at said time or at any other time go upon said lands and remove therefrom and sell to the War Department of the United States of America one hundred ten thousand (110,000) cubic yards of plaintiff's rock, gravel or sand or any part thereof, for the sum of Two Hundred Twenty-seven Thousand Seven Hundred and no/100 ($227,700.00) Dollars, and that neither said sum nor any part thereof was paid to the defendants by the War Department of the Government of the United States of America as or for the purchase price of said property and the defendants did not become indebted to the plaintiff in the amount of Two Hundred Twenty-Seven Thousand Seven Hundred and no/100 ($227,700.00) Dollars, or any part thereof; that this action is brought by the plaintiff in assumpsit and the plaintiff has by its pleading waived all right of action for any tort against the defendants; that the defendants did not by reason of any sale to the said War Department, or otherwise, become indebted to the plaintiff in the sum of Two Hundred Twenty-seven Thousand Seven Hundred and no/100 ($227,700.00) Dollars, or any other sum and the defendants did not agree to pay to the plaintiff said sum of Two Hundred Twenty-seven Thousand Seven Hundred ($227,700.00) Dollars, or any part thereof;

IV.

That the defendants have not paid said sum or any part thereof to the plaintiff but have refused and still refuse to pay said sum of money or any part thereof to the plaintiff and there is not now due, owing or unpaid from the defendants to the plaintiff the sum of Two Hundred Twenty-seven Thousand Seven Hundred and no/100 ($227,700.00) Dollars, with interest thereon from May 6, 1943, at the rate of six per cent per annum or any part thereof or any sum of money whatever;

V.

The Court further finds that on the 8th day of December, 1941, pursuant to the recommendation and request of the President of the United States of America to the Congress thereof a state of war was by the said Congress declared to exist between the Government of the United States of America on the one hand and the Imperial Government of Japan, the Government of Germany, and the Government of Italy on the other; that thereafter and on December 18, 1941, the Congress of the United States of America passed and immediately thereafter the President signed and approved the "First War Powers Act of 1941", being Title 50 App. 601, U.S.C.A., and thereafter and pursuant to said Act and in harmony with and by virtue thereof the President of the United States of America on December 27, 1941, made, issued and published and caused to become effective Executive Order No. 9001 authorizing and directing, among other things, the War Department of the United States to construct and build airports and enter into contracts for the building and construction of the same for the United States of America and to do any and all acts or things incidental thereto or in connection therewith, all in the furtherance of the effort of the United States of America to bring the war to a successful conclusion;

VI.

That in harmony with said War Powers Act of 1941 and Executive Order No. 9001 above referred to the United States of America, acting through its War Department, Corps of Army Engineers did on December 29, 1942, enter into a written contract with the defendants by the terms of which, among other things, the defendants agreed to build and construct an airport at a point approximately fourteen (14) miles South of Mountain Home and contract provided among other things that the Government of the United States would furnish, provide and designate to the defendants a gravel pit which would be designated by the Government's contracting officer; that pursuant to said contract the Government's contracting officer did designate as such gravel pit the aforesaid Lot Thirteen as one of the lots from which gravel should be taken for the construction of said air base and staked out the same and instructed the defendants to take and extract gravel and other aggregate from the pit so designated;

VII.

That on or about December 29th, 1942, and pursuant to the terms of a written contract, aforesaid, the defendants entered upon the lands of the plaintiff for the purpose of carrying out the terms and provisions of the contract hereinbefore referred to and for the building and constructing of the airport;

VIII.

That at all times the defendants were acting as the agents, servants and employees of the Government of the United States and all gravel, aggregate, and materials extracted by them from the lands owned by the plaintiff were extracted and taken for the use and benefit of the United States of America in building and constructing said airport project and for no other purpose and in removing said *travel* [sic] the defendants were acting pursuant to and in

accordance with the terms of its written contract with the War Department of the Government of the United States;

IX.

That on or about November 1, 1942, the Corps of Army Engineers of the United States of America acting under the direction of the War Department of the United States and acting pursuant to the authority conferred under the First War Powers Act of 1941 and the aforesaid Executive Order No. 9001 went upon and explored the said Lot Thirteen and found gravel thereon suitable for construction purposes, and then and there staked out said ground for such purpose and designated the Lot as one of the Lots from which gravel should be taken for the construction of said air base;

X.

That the actions of the Government of the United States and its agents and servants in going upon said Lot Thirteen, staking out and designating the same as a Lot from which gravel should be taken for use in the construction of said air base and the actions of the defendants in removing gravel therefrom were taken without the consent of the plaintiff;

XI.

That Lot Thirteen (13) of Jerome Addition to Mountain Home, Elmore County, Idaho, is part of a tract of land in said Addition which consists of 138.5 acres, being that part of said Addition in the Southwest Quarter of Section Twenty-three (23), Township Three (3) South, Range Six (6) East of the Boise, Meridian, in Elmore County, Idaho, lying south and west of the main line of the Union Pacific Railway; that said Lot Thirteen claimed to be owned by the plaintiff, has the dimensions of 291.12 feet north and south and 600.4 feet east and west, having an area of 4.001 acres;

XII.

That no part of said gravel so removed from said Lot Thirteen was sold by the defendants to the Government of the United States; that the compensation received by the defendants from the Government of the United States under the terms of the contract hereinbefore mentioned was paid to the defendants for servicing, processing and extracting said gravel from said gravel pit and placing the same in position as a part of the construction of said air base;

XIII.

That the defendants entered upon said Lot Thirteen and removed said gravel without any intention of wilfully or intentionally trespassing upon any right of ownership or possession in the plaintiff or her predecessor in interest;

XIV.

That the United States of America as plaintiff brought an action in the District Court of the United States in and for the District of Idaho, Southern Division, being Case No. 2225 against 138.5 acres of land in Elmore County and that said land included said Lot Thirteen; that said action was commenced on May 6, 1943, and on said date the Judge of said Court made and entered an order granting immediate possession to take effect at 12:00 o'clock noon, May 7, 1943; that on November 4, 1943, the Judge of said Court entered an order by which title vested in the United States; that plaintiff herein appeared in said action and on February 26, 1945, the said land was condemned and the plaintiff herein was subsequently paid the sum of One Hundred Twenty-five and no/100 ($125.00) Dollars under said Order of Condemnation, which decrees that, as of May 7th, 1943, the fair market value of Parcel No. 4 is the sum of One Hundred Twenty-five and no/100 ($125.00) Dollars, and that Dorothy Rorrison Ringele is entitled to have the same in full settlement for said Parcel No. 4. That on

March 5, 1945, a Final Decree of Condemnation was made in said case.

From the foregoing Facts the Court legally Concludes:

I.

That any gravel or other aggregate by the defendants removed from the lands so belonging to the plaintiff was removed by the defendants pursuant to the terms of a written contract entered into between the defendants and the War Department of the United States for the construction of an air base at Mountain Home and that the defendants were then and there as contractors executing the will of Congress under authority validly conferred by it upon them and that the defendants did not in removing said gravel in any way exceed the authority validly conferred upon them by the terms of said written contract;

II.

That the taking of said gravel was for a public use and authorized by a valid statute;

III.

That the defendants in entering upon said land and removing said gravel were not guilty of any wilful, intentional or other trespass but acted in good faith in going upon said lands and removing the gravel therefrom;

IV.

That the plaintiff cannot maintain this action in indebitatus assumpsit, or otherwise, against the defendants;

V.

That the plaintiff is not entitled to any recovery against the defendants in this action and a Decree of this Court should be entered decreeing that the plaintiff take nothing

by this action and that the defendants are entitled to their costs and disbursements herein expended;

Let Decree be entered accordingly.

Dated at Boise, Idaho, this 7th day of September, 1954.

CHARLES E. WINSTEAD
District Judge.

(Filed: Sept. 7, 1954)

FILED
MAY 17 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 924

DOROTHY RORRISON RINGELE,

Petitioner,

v.

J. W. TERTELING AND N. L. TERTELING, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF J. A. TERTELING AND SONS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

JOHN W. GASKINS,
Washington, D. C.,
Attorney for Respondents.

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Opinion Below

The original opinion of the Supreme Court of the State of Idaho and the opinion on rehearing are reported at 78 Idaho ———; 305 P. 2d 314.

Jurisdiction

The opinion of the Supreme Court of Idaho on rehearing was entered on December 20, 1956. The petition for

a writ of certiorari was filed on April 19, 1957. The jurisdiction of this Court is invoked under Section 1 of the Fourteenth Amendment of the Constitution of the United States and under the provisions of 28 U.S.C. 1257(3) and 2101(c).

Questions Presented

1. Whether respondents, performing a contract for the United States which had been validly authorized by the First War Powers Act and Executive Order No. 9001, are immune from liability as agents of the United States when, acting in accordance with the requirements of said contract, and without exceeding in any respect the authority conferred upon them, they removed gravel from the lands of the petitioner before the United States had condemned such land?

2. Whether the Supreme Court of Idaho, in holding petitioner to the theory of its case upon which it had proceeded in the trial court, deprived petitioner of due process of law as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution?

Constitutional Amendment, Statute and Executive Order Involved

The First War Powers Act of December 18, 1941, 55 Stat. 839, 50 U.S.C. App. Section 611, provides in pertinent part as follows:

> The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, with-

out regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war; * * *

Executive Order No. 9001 of December 27, 1941, 6 F. R. 6787, 3 CFR, 1941 Supp., p. 330, provides in pertinent part as follows:

> By virtue of the authority in me vested by the Act of Congress, entitled "An act to exepdite the prosecution of the War effort", approved December 18, 1941, (hereinafter called "the Act") and as President of the United States and Commander-In-Chief of the Army and Navy of the United States and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power

to make further delegations of such powers within the War and Navy Departments and the United States Maritime Commission.

Section 1 of the Fourteenth Amendment to the Constitution relied upon by petitioner is quoted at page 3 of the petition.

Statement of the Case

On December 29, 1942, the Corps of Engineers of the Army, acting pursuant to the authority of the First War Powers Act and Executive Order No. 9001 entered into a valid written contract on behalf of the United States with the respondents for the construction of an airbase near Mountain Home, Idaho (R. 48).

The specifications to this contract provided in part as follows:

SC-7. Government furnished materials and/or equipment—The materials and equipment entering into the construction under this contract which are not to be procured by the contractor are as follows * * *.

(2) Gravel pit site—The Government will furnish without cost to the contractor, a gravel pit site, which will be designated by the contracting officer, in the S. W. ¼, Sec. 23, T. 3S., R. 6 E.B.M., as provided for in the technical provisions of these specifications.

2-01. Scope. The work to be done under this section includes the furnishing of all materials and equipment and performing all labor necessary to furnish, deliver and stockpile the concrete aggregate, for cantonment structures, and screenings in accordance with these specifications and as otherwise directed.

2-02. The Government will furnish without cost to the contractor, gravel pit sites in the following locations:

All of lots * * * 13 * * * lying south and west of

Oregon Short line railroad right-of-way, and above in section 23, Township 3 south, range 6 east, Boise, Meridian.

Thus, the United States, under the contract, was to furnish the gravel pit, and respondents were to extract, process and incorporate the gravel into the work at the airbase. Included in the area designated by the specifications as a gravel pit was the land owned by petitioner (R. 48-49).

Prior to the execution of the contract, the Corps of Engineers had entered upon petitioner's land, explored it and staked out upon the same the areas from which gravel was to be taken (R. 49).

After the execution of the contract on December 29, 1942, respondents proceeded with the performance of the work and from that date until May 6, 1942, removed 110,000 cubic yards of gravel from petitioner's land, which they processed and placed at the airbase (R. 40). The actions of the United States and of respondents in entering upon petitioner's land, and in extracting the gravel therefrom, were without the consent of petitioner (R. 49-50).

On May 6, 1943, the United States instituted condemnation proceedings in the United States District Court for the District of Idaho, Southern Division, to acquire petitioner's land, these proceedings being designated Case No. 2225 on the docket of said Court. An order granting possession of the land was issued which became effective May 7, 1943 (R. 50-51). Subsequently, the petitioner was paid the sum of $125.00 under the order of condemnation, the order having decreed that the fair market value of the property as of May 7, 1943 was $125.00. A Final Decree of Condemnation was issued on March 5, 1945.

Petitioner brought action in the District Court of Idaho against respondents, waiving the tort and proceeding in assumpsit, and by such action sought recovery for the

gravel taken from her lands in the amount paid by the United States to the respondents for such gravel (R. 22-23). Respondents defended on the ground that in performing a contract properly authorized by the First War Powers Act, and in extracting the gravel from petitioner's land pursuant to directions of the United States, they were acting as agents of the United States, and that, therefore, no personal liability to petitioner was incurred (R. 27-28). The Idaho District Court held for respondents.

Petitioner appealed to the Supreme Court of Idaho and that Court reversed the District Court after holding that respondents' actions constituted a conversion, and that such an act was beyond "the authority conferred upon the Engineers of the War Department and beyond their authority to authorize respondents to commit." However, the Idaho Supreme Court held that respondents' entry upon petitioner's land had been in good faith and in reliance on the terms of their contract with the United States. Therefore, the Court held that the proper measure of petitioner's damages was the reasonable market value of the gravel in place on petitioner's premises. The Court further held that as there had been no sale of the gravel by respondents to the United States, it necessarily followed that no money was received by respondents for the benefit of petitioner, and that there could, therefore, be no recovery of the purchase price allegedly paid by the United States to respondents for the gravel. The cause was remanded for further proceedings on the amount of damages in accordance with the Court's ruling.

Both parties asked for rehearing, and the United States was permitted to file a brief amicus curiae and to present oral argument at the rehearing in support of respondents' position. The petitioner on reargument expressly rejected recovery of the value of the gravel in place and insisted on

recovery of the alleged sales price of the gravel paid to respondents by the United States, despite the finding by both courts that there had been no sale of the gravel and that respondents had only been paid for extracting, processing and placing the gravel at the airbase.

An opinion on rehearing was rendered by the Idaho Supreme Court on December 20, 1956 (R. 71). The Court in that opinion held that since the petitioner had persisted in her theory as to the measure of damages, the rule applied that an appellant would be held to the theory on which the case was tried in the court below. Accordingly, the Court decided that the cause should not be remanded and affirmed the judgment of the trial court.

Reasons for Denying the Writ

The writ of certiorari should be denied because:

1. The decision of the Idaho Supreme Court on rehearing produced the legally correct result of observing respondents' immunity from liability as agents of the United States, and did not deprive petitioner of any right under the Constitution.

2. The case as finally decided does not involve questions of federal law and is not of sufficient public importance to justify its consideration by this Court.

Argument

Respondents' act in removing the gravel from petitioner's land was performed pursuant to the requirements of a contract between respondents and the United States, which contract had been lawfully entered into by the Corps of Engineers, acting on behalf of the United States, under the authority granted by the First War Powers Act and Executive Order No. 9001. This contract recited that the United States had made the said land available to respond-

ents for the purpose of obtaining such gravel. As respondents were thus acting as agents for the United States, and were not exceeding in any respect the authority which had been validly conferred upon them, no liability may attach to respondents for injury caused to another. *Yearsley* v. *Ross Construction Co.*, 309 U.S. 18, 21; *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 343; *Crozier* v. *Krupp*, 224 U.S. 290, 305; *Philadelphia Company* v. *Stimson*, 223 U.S. 605, 619, 620, *cf.; United States* v. *Lee*, 106 U.S. 196, 220, 221; *Noble* v. *Union River Logging Railroad Co.*, 147 U.S. 165, 171, 172; *Tindal* v. *Wesley*, 167 U.S. 204, 222; *Scranton* v. *Wheeler*, 179 U.S. 141, 152; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 108, 110.

The conduct of the Army Corps of Engineers and of the respondents, acting as agents for the United States, constituted a taking of petitioner's property for a public purpose for which just compensation was payable. However, as this Court held in the *Yearsley* case, the United States has impliedly promised to pay such compensation, and has afforded a remedy for its recovery by suit in the Court of Claims. What effect the award given petitioner after its property was condemned would have upon such an action in the Court of Claims, need not be decided in the present case.

The Supreme Court of Idaho in its original decision rejected respondents' defense based on the *Yearsley* case and held that the actions of respondents and of the Corps of Engineers were beyond their authority. In so deciding, respondents believe that the Court erred. However, the correct result with respect to respondents' immunity as an agent of the United States was ultimately reached when the Supreme Court of Idaho on rehearing later affirmed the trial court's denial of any recovery.

With respect to the supposed failure to afford petitioner due process, all that the Idaho Supreme Court has done by its decision on rehearing is to indirectly correct its original decision which had erroneously ignored respondents' immunity from liability because of their agency relationship, and at the same time give effect to an elementary requirement of appellate procedure which restricts an appellant to the theory of his case as advanced in the trial court.

In the trial court, petitioner's pleading and proof had been directed to the recovery of the purchase price supposedly paid by the United States to respondents for the gravel taken from petitioner's land. In its original decision, the Idaho Supreme Court found that there had been no sale from respondents to the United States, the proceeds of which could be paid to petitioner, but then went further, and apparently because of the fact that respondents' entry upon petitioner's land had been in good faith, remanded the case for entry of judgment based on the value of the gravel in place upon petitioner's land. When petitioner noted her dissatisfaction by requesting a rehearing and expressly refused to accept the Idaho Supreme Court's ruling on the measure of damages, the Idaho Supreme Court reversed itself and affirmed the judgment of the trial court. In doing so, the Court was not penalizing the petitioner for requesting a rehearing as the petitioner had argued, but was correcting its earlier decision and at the same time properly restricting an appellant to the theory of recovery advanced by it in the lower court and adhered to in the appellate court. *Martin* v. *Grogan Cockran Lumber Company,* 176 S.W. 2d 780; *cf. Mutual Life Ins. Co.* v. *McGrew,* 188 U.S. 291, 308, 309. In doing so, the Idaho Supreme Court did not deprive petitioner of due process, but was deciding questions of the measure of damages under Idaho law and of procedure before Idaho courts. No question of federal law was involved in the case as thus finally decided.

Stone v. *United States*, 167 U.S. 178, cited by petitioner, is not relevant to the issues in this case. In the *Stone* case the United States sought to recover the value of timber and railroad ties manufactured from trees wrongfully cut from the lands of the United States. In order to decide the case, it was necessary to determine whether the settlers who cut the trees had acquired title to them in accordance with the conditions of the law. The Court held that if the trees were cut with an intent to defraud the United States and without intent to improve the land as required by the homestead and preemption laws, the value of the cut timber and the railroad ties could be recovered. This decision has no application to the question of immunity in the present case, and is not pertinent to the measure of petitioner's damages, since both the trial court and the Idaho Supreme Court found that respondents entered petitioner's lands in good faith, and not arbitrarily or maliciously.

Even if reasonable grounds to question the correctness of the ultimate action taken by the Idaho Supreme Court did exist, which respondents insist do not, the case would not involve a question of sufficient public interest to justify its consideration by this Court.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN W. GASKINS,
Washington, D. C.,
Attorney for Respondent.

MAY 1957

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